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IN THE

Supreme Court of the United States

October Term, 1968
No. 1168

FRANK A. LOMBARDY, *et al.*,

Appellants,

vs.

PETER KIEWIT SONS' CO., a corporation, and PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellees.

On Appeal From the Court of Appeal of the State of California, Second Appellate District, Division Three.

Motion of Appellee People of the State of California to Dismiss Appeal and Brief in Support Thereof.

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Appellees.

On Appeal From the Court of Appeal of the State of California, Second Appellate District, Division Three.

Motion of Appellee People of the State of California to Dismiss Appeal and Brief in Support Thereof.

The People of the State of California, acting by and through the Department of Public Works, hereinafter called the "State", hereby move this Honorable Court to dismiss the appeal herein. This motion is made pursuant to Rule 16(1)(b), Rules of the Supreme Court of the United States, on the grounds that no substantial federal question is presented by appellants and that the judgment of the court below rests on an adequate non-federal basis.

I.

Supplemental Statement of Proceedings Below.

The trial court sustained this Appellee's demurrer to appellants' Third Amended Complaint on the ground that it failed to state facts sufficient to constitute a cause of action against the State [Minute Order of October 24, 1966, Clerk's Transcript, p. 123], and entered Judgment of Dismissal [C. T. p. 124]. The said Minute Order sets forth the grounds therefor, incorporating by reference its Minute Order of August 22, 1966 [C. T. p. 88] which sustained this Appellee's demurrer to appellants' Second Amended Complaint, and also incorporating by reference this Appellee's points and authorities as set forth in Clerk's Transcript, pages 109 through 111. The gist of said grounds, quoting from Clerk's Transcript, page 88, follows:

> "Specifically, the complaint does not state a cause of action:
>
> 1. In Inverse condemnation (trespass); People vs Presley (1966) 239 ACA 328; People vs Symons (1960) 54 C 2nd 855; Friesen vs City of Glendale (1930) 209 Cal 524 (tract restrictions).
>
> 2. For a *public nuisance,* because it fails to allege facts showing that the alleged nuisance is 'specially injurious' to plaintiff. In view of the fact that the complaint lists eighteen plaintiffs, it appears on the face of the complaint that the alleged nuisance 'affects any considerable number of persons', and

therefore is a public nuisance. Civil Code section 3480. In order to state a cause of action for a public nuisance, plaintiff must allege facts showing that it is 'specially injurious to' themselves, as opposed to the public generally. Civil Code section 3493; Ward vs Oakley (1954) 125 CA 2nd 840; Wallace vs MacDonough Theater Co. (1917) 34 CA 498.

3. For a private nuisance. In order to state a cause of action based on a private nuisance, the alleged facts must show an injury or invasion of private right or interest of plaintiffs, Civil Code sections 3480, 3481; 36 Cal Jur 2nd 490; Reinhard vs Laurence Warehouse Company (1940) 41 CA 2nd 741, 745. The facts alleged do not show any right to be free from damage or injury caused by fumes, noise, dust, shocks and vibrations, traffic, or impairment of view, and arising from the construction or operation of a freeway in the vicinity of plaintiffs' homes by defendant State of California; People vs Presley (1966) 239 ACA 328 (not a 'property interest'); People vs Symons (1960) 54 Cal 2nd 855."

The California Court of Appeal sustained the judgment of the trial court, specifying the several grounds therefor beginning at page 656 of 266 Advance California Appellate (See Appellants' Juris. State. Appendix, p. A-3, Headnote [1], *et seq.*) Said grounds were substantially the same as those of the trial court.

II.

The Judgment Below Rests on Sound Bases Consonant With Prior Decisions of This Court.

The foregoing supplemental statement specifies the grounds for the holdings of the courts below. The California Supreme Court, by denying a hearing, impliedly concurred. The pertinent portions of the pleadings are quoted in the California Court of Appeal decision at pages 655 and 656 of 266 Advance California Appellate (See Appellants' Juris. State. Appendix pp. A-2 and A-3). Said pleadings alleged facts which expressly negate the existence of a private nuisance and allege, if anything, what might amount to a public nuisance if not authorized by legislation. The reasoning of the appellate court below, beginning at Headnote [5a] on page 658 of 266 A.C.A. (See Appellants' Juris. State Appendix, p. A-5) and continuing through Headnotes [6] and [5a] clearly points this out and shows express statutory authorization for this freeway construction and operation (Art. IV, Sec. 36, Calif. Constitution, Calif. Gov't Code, §§ 14000 and 14001, and Calif. Streets & Highways Code, §§ 90 *et seq.*).

Said holding by the appellate court below is entirely consistent with the two U.S. Supreme Court decisions cited by appellants in their Jurisdictional Statement herein containing analogous facts and legal principles, to wit: *Richards v. Washington Terminal Co.* (1913), 233 U.S. 546; *Baltimore & P. R. Co. v. Fifth Baptist Church* (1883), 108 U.S. 317.

In the *Richards* case,[1] this court held that there was

[1]In *Richards v. Washington Terminal Co., supra,* plaintiff's complaint alleged that smoke, cinders and gases damaged furniture and other personal property, that vibrations cracked walls and

no "taking," within the constitutional provision, for such damages

> ". . . as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad. [This] includes the noises and

---

wallpaper, broke windows and disturbed the peace and slumber of the occupants. In limiting recovery to just such damages as was caused by the smoke and gases directed on said property from a tunnel exhaust system, the court said, at page 551 of 233 U.S.:

> ". . . [W]ith respect to most of the elements of damage to which the plaintiff's property has been subjected, the courts below correctly held them to be *damnum absque injuria*; but that with respect to such damage as is attributed to the gases and smoke emitted from locomotive engines while in the tunnel, and forced out of it by means of a fanning system through a portal located so near plaintiff's property that these gases and smoke materially contribute to injure the furniture and render the house less habitable than otherwise it would be, there is a right of recovery."

Continuing, at page 553 of 233 U.S.:

> "We deem the true rule, under the 5th Amendment, as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use. (Citations.)."

The Court then goes on, at page 554 of 233 U.S. to define what *does* and what *does not* amount to such a "taking" of property, saying that railroads are not subject to actions by adjacent owners for ordinary damages attributable to the operation of the railroad, in the absence of negligence, that:

> "Such roads are treated as public highways, and the proprietors as public servants, with the exemption normally enjoyed by such servants from liability to private suit, so far as concerns the incidental damages accruing to owners of non-adjacent land through the proper and skilful management and operation of the railways. Any diminution of the value of the property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a 'taking' within the constitutional sense."

vibrations incident to the running of trains, the necessary emission of smoke and sparks from the locomotives, and similar annoyances inseparable from the normal and non-negligent operation of a railroad." (233 U.S. at p. 554)

In *Baltimore & P. R. Co. v. Fifth Baptist Church, supra,* this court recognized the same legal principles, saying at page 331 of 108 U.S.:

> "Undoubtedly, a railway over the public highways of the District, including the streets of the City of Washington, may be authorized by Congress, and if when used with reasonable care it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyances may necessarily follow from the running of the cars on the road with reasonable care is *damnum absque injuria.* The private inconvenience must be suffered for the public accommodation."[2]

The foregoing quotation applies fully to the case at bar, if "freeway" were substituted for "railroad". The lan-

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[2]The court goes on to say, at page 332 of 108 U.S.:

> "The acts that a Legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public has control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

The matter just quoted is in accord with the holding in the *Richards v. Washington Terminal Co.* case, cited *supra,* and with the holding of the California Court of Appeal in the case at bar.

guage is synonymous with that of the appellate court below in the case at bar.

The foregoing quotations from prior decisions of this court show complete accord with the holdings of the lower courts in the case at bar, to wit, that noise, dust, fumes, and vibrations from normal operations of a railroad or a public highway (including freeways) do not constitute "takings" for which the U.S. Constitution requires the payment of compensation. Instead, they constitute factors which the public interest requires the individual to accept as a necessary adjunct to modern civilization, suffered in varying degrees along with the general public.

Section 3482 of the California Civil Code merely codifies the well-settled and long-followed rule enunciated in said prior decisions of this court. As applied to the pleadings in the case at bar, said statute denies a right to compensation in connection with those activities which this court has judicially declared *damnum absque injuria.* Appellants herein did not plead any special or peculiar damage to their property such as a tunnel exhaust system directed toward their properties or a railroad-like repair shop operation conducted adjacent to their properties. The type of damage pleaded was that which the general public suffers in varying degree, as was so succinctly pointed out by the appellate court below (See Appellants' Juris. State. Appendix at pp. A-5 and A-6).

Therefore, this Appellee submits that the courts below followed well-settled law enunciated in U.S. Supreme Court decisions, U.S. Court of Appeal decisions, and prior California court decisions. See *Batten v. U.S.*, 306 F. 2d 580 (CCA 10, 1962) cert. den. 371 U.S. 955, Reh. den. 372 U.S. 925, denying recovery for noise,

vibration and smoke from nearby jet base; to the same effect, see *Bellamy v. U.S.*, 235 F. Supp. 139 (E.D.S.C. 1964). See also *Nunnally v. U.S.*, 239 F. 2d 521 (CCA 4) denying recovery where noise and vibrations from practice bombing on adjoining federal land damaged recreational cottage; and see *Bartholomae Corp. v. U.S.*, 253 F. 2d 716 (CCA 9) where nuclear detonations on other lands damaged property.

III.

The Judgment Below Rests on an Adequate Non-Federal Basis.

The judgment below rests on several grounds, as has been previously noted. Appellants failed to comply with basic pleading requirements and did not allege facts showing any substantial damage resulted from the activities of this respondent. Absence of such necessary allegations in four attempts implies that they did not exist. Failure to meet such basic pleading requirements of California Law does not raise a federal issue.

The courts below held that appellants have no "property right" to be free from mental, physical and emotional distress caused by fumes, noise, dust, shocks and vibrations incident to normal construction and operation of a freeway. This holding is in accord with this court's decisions as pointed out hereinabove. Apart from those decisions, *U.S. ex rel. Tennessee Valley Authority v. Powelson,* 319 U.S. 266, states at page 279 that while the meaning of "property" as used in the 5th Amendment is a federal question, "it will normally obtain its content by reference to local law". Therefore, the judgment below rests on an adequate non-federal basis.

IV.

The Cases Involving Trespass of Air Space Do Not Sustain Jurisdiction of the Case at Bar.

Portsmouth Harbor etc. Co. v. U.S. (1922), 260 U.S. 327, involved trespass of air space by firing projectiles from a shore battery directly over private property toward the ocean; *United States v. Causby* (1946), 328 U.S. 256, and *Griggs v. County of Allegheny* (1962), 369 U.S. 84, both involved trespass of air space by aircraft overflights in landing and takeoff. A review of these three cases cited by appellants in their Jurisdictional Statement fails to reveal any manner in which those cases are analogous to the case at bar so as to sustain the jurisdiction of this court. In these three cases, liability was based on the theory that the owner possessed a *property right* in the air space immediately above the surface of his property, that invasions of this air space by such physical objects as projectiles and aircraft on a continuing basis constituted the "taking" of an air easement.

In the case at bar there are no allegations of a *physical invasion of the air space* above appellants' properties, either by bridges or other structures, nor that the airspace or the land surface was used by vehicles entering or leaving the freeway. Therefore, the latter three cases provide no factual or legal basis to sustain the jurisdiction of this court to hear the case at bar.

V.

Appellants Failed to Docket Their Case in This Court Within the Time Prescribed by the Rules of This Court.

Rule 13, Rules for the Supreme Court of the United States, requires appellants to docket the case within ninety days after the entry of the judgment appealed from.

Under California Rules of Court, Rules 24, 27, and 28, the judgment below became final on December 11, 1968, when the California Supreme Court denied appellants' Petition For Hearing.

Appellants failed to docket their case within ninety days from December 11, 1968.

Therefore, this appellee submits this appeal should be dismissed for unexcused failure to docket within the time required under this Court's Rules.

VI.

Conclusion.

This appellee respectfully submits that, based upon the foregoing grounds, singularly and together, this appeal should be dismissed.

Dated April 4, 1969.

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